

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES HARRIS,	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	
JOANNE BARNHART, SOCIAL	:	
SECURITY ADMINISTRATION,	:	NO. 03-0213
Defendant	:	

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

July 7, 2004

I. INTRODUCTION

James Harris ("Harris") seeks judicial review, under 42 U.S.C. §§ 405(g), of the Social Security Administration's ("SSA") decision to deny Supplemental Security Income and Disability Insurance Benefits under Titles II and XVI of the Social Security Act.

The parties filed cross motions for summary judgment. Chief Magistrate Judge James R. Melinson ("Judge Melinson") issued a Report and Recommendation ("R&R") to grant SSA's motion for summary judgment and uphold the SSA's denial of benefits. Harris objects that the SSA and Judge Melinson: 1) improperly disregarded treating doctors' opinions; 2) failed to review the whole medical record; 3) improperly discredited Harris' testimony; and 4) mischaracterized the facts. On de novo review, the SSA's motion is granted, Harris' motion is denied, and the decision of the SSA is affirmed.

## **II. FACTS**

Harris, born May 10, 1964, has a high school education, and past relevant work as an order picker, kitchen helper, and mold maker's helper; these jobs are classified as "unskilled medium" and "semi-skilled medium" work. Tr. at 286.

In July 1994, while working, Harris suffered a spinal neck injury, causing weakness in his leg and arm. Imaging studies showed a herniated disc between the fourth and fifth cervical vertebrae (C4-5). Harris underwent a microdiscectomy on August 4, 1994, performed by Alan R. Turtz, M.D. ("Dr. Turtz"), Chief of Neurosurgery at the Medical College of Pennsylvania ("MCP"). Immediately after surgery, Harris reported improvement in his symptoms. Tr. at 215-16.

At a post-operative checkup on August 21, Harris complained his leg and arm weakness had returned to pre-operative levels. Finding Harris' symptoms were out of proportion to Harris' condition observed during surgery, Dr. Turtz performed a residual herniated disc surgery at C4-5, on August 31, 1994. Tr. at 233-34. After the second surgery, Dr. Turtz found Harris had 4/5 strength in his left arm, with depressed reflex. Dr. Turtz noted Harris walked with a limp and used a cane.

In October 1994, Dr. Turtz noted overall improvement. Tr. at 139, 140. In November, Dr. Turtz noted Harris walked with a left leg limp and used a cane "for security." Dr. Turtz agreed

to keep Harris out of work for another six months to observe his rehabilitation progress. Tr. at 137.

In December, an electromyogram (EMG) revealed mild carpal tunnel syndrome in Harris' right arm and a compression of the nerve root by herniated disc material at C5-6, but no acute nerve root irritation or nerve root injury. Tr. at 136. The doctor noted he had "given [Harris] disability." Tr. at 136, 244.

At some point in 1995, Harris was under the care of Giancarlo Barolat, M.D. Dr. Barolat's records were not made available. In November 1995, experiencing neck and thigh pain and numbness and tingling in his hands, Harris was referred to Richard Kaplan, M.D., ("Dr. Kaplan") a physical medicine and rehabilitation specialist. In his November 8 report, Dr. Kaplan documented Harris' physical condition:

He does not display bizarre or unusual pain behavior.  
He has restricted mobility in his cervical spine. . .  
. He has some restrictions in right shoulder mobility.  
He has good range in the elbows, wrists, and fingers.  
Paresthesias<sup>1</sup> are produced with stroking his hands. He  
moves stiffly into lumbar flexion of 80 degrees and  
extends 20 degrees. He is tight in his hamstrings.  
Reflexes are hypotonic [depressed] but symmetrical.  
*There are no motor problems.*

Tr. at 209 (emphasis added). On December 6, Dr. Kaplan noted Dr. Barolat had suggested Harris was not a candidate for surgery. Dr. Kaplan opined Harris "remains disabled for employment," and began treatment including acupuncture and medication. Tr. at 207.

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<sup>1</sup> A paresthesia is tingling or numbness with no objective cause. Merriam-Webster Online Dictionary at <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=paresthesia> (last visited June 28, 2004)

Dr. Kaplan treated Harris noted through several years of sporadic treatment that Harris' condition did not appear to improve. Dr. Kaplan opined on numerous occasions that Harris "remains disabled," without documenting medical evidence to support his conclusion. Tr. at 147-207. In September 1996, Dr. Kaplan began noting "trigger areas" in the lower lumbar region (S1). Tr. at 199.

In July 1997, after several months of urging by Dr. Kaplan, Harris returned to Dr. Turtz for a follow-up examination. Dr. Turtz reported medical imaging (MRI) revealed adequate decompression at the C4-5 level from the previous surgery, and a disc herniation at the C3-4 level with no gross cord compression. Dr. Turtz opined Harris' left arm strength was better, and his left arm pain was not due to the C3-4 disc. Nevertheless, Dr. Turtz suggested a discectomy and fusion at C3-4 to correct the herniated disc. Tr. at 134-35. It does not appear from the record that this surgery ever took place.

Harris returned to the care of Dr. Kaplan after this follow-up exam, and his acupuncture treatment continued. Through 1998, Dr. Kaplan noted increasing lower back problems, including muscle spasms. Tr. at 173.

In March 2000, Harris complained of leg shaking and a resulting fall. Dr. Kaplan reported, "I am not sure what is going on. Perhaps there is advancement of his now chronic

situation. I would like to obtain new MRI studies." Tr. at 161. On May 31, 2000, after the MRI, Dr. Kaplan noted it showed increased spinal cord impingement, and referred Harris to Alan Hillabrand, M.D., at the Rothman Institute, for consideration and possible correction. Tr. at 159.

The record does not reveal whether Harris saw Hillabrand, or any medical treatment whatsoever between May 31, 2000, and January 5, 2001. On that date, Dr. Kaplan reported continued treatment and unchanged medical condition.

On August 10, 2001, Dr. Kaplan noted Harris' complaints of increased numbness and tingling in his hands. Dr. Kaplan opined Harris had carpal tunnel syndrome ("CTS"), because Harris reported the tingling and numbness happened only at night. Tr. at 152. There is no evidence in the record of any follow-up on CTS as the cause of numbness and tingling in Harris' hands.

On the evening of November 7, 2001, suffering from pain and unable to sleep, Harris went to the MCP emergency room. Tr. at 238. Dr. Kaplan requested a repeat MRI on November 14. Tr. at 149. That MRI, conducted on January 10, 2002, showed spinal canal stenosis (narrowing) at C3-4 and C5-6, but no abnormal signal activity in the spinal cord itself, and no abnormal blood flow to the cord. Tr. at 212.

Harris testified that he wears a neck brace and can lift five to eight pounds. He also testified that since surgery he

has used a cane every day. He stated he could sit for ten to fifteen minutes, stand for ten minutes, and walk a block and a half. He stated he cannot bend without a sharp pain from his neck to his lower back. Harris occasionally takes a short walk for exercise, and occasionally visits friends. His preference is to lie down most of the time. He does no housework, laundry, or cooking, and is dependent on his mother. He states a side effect of his medication, prescribed by Dr. Kaplan, is drowsiness. Tr. at 271-80.

### **III. PROCEDURAL HISTORY**

Harris filed his application for benefits in 2001, based on his 1994 injury. The SSA state agency medical consultant found Harris capable of medium exertion work, and the agency denied the application. The hearing Harris requested was held before Administrative Law Judge Irving A. Pianin ("ALJ") on May 24, 2002.

The ALJ found Harris' impairment did not fit one of the prescribed per se disabilities listed in 20 C.F.R. § 404, Subpart P, Appendix 1, Regulation No. 4. The ALJ also found Harris walked with a cane, but it was unclear whether the cane was medically necessary. Tr. at 20.

The ALJ reviewed Harris' age, education, and prior work history, and inquired of a vocational expert, Mindy Lubek ("VE") as to his work prospects. The ALJ asked the VE whether a

hypothetical claimant with the same age, education and work history as Harris, who could perform light work with a sit/stand option involving occasional postural activity, limited rotation or flexing of the head and neck, and limited finger sensation could perform any jobs existing in significant numbers in the national economy. The VE answered such a claimant could perform jobs including ticket selling, assembly, and product inspection, all of which existed in significant numbers in the national economy. Tr. at 286-89. The ALJ then asked the VE to grant full credit to all Harris' subjective complaints; the VE responded such a claimant would not be able to work. Tr. at 289-90.

After reviewing the medical record, and weighing Harris' age, education, and past employment, the ALJ found: 1) Harris' spine condition was a severe impairment; 2) it did not medically equal any specific impairment in the regulations; 3) Harris was unable to perform his pre-injury job; 4) Harris' allegations as to his limitations were not fully credible; and 5) Harris had the residual functional capacity for light work existing in significant numbers in the national economy. Tr. at 23-24. The ALJ listed the types and numbers of light work positions available to Harris: assembler (4,000 regionally / 300,000 nationally); ticket seller (10,000 regionally / 500,000 nationally); product inspector (1,000 regionally / 70,000 nationally). Tr. at 24.

The ALJ found Harris not disabled, and denied Disability Insurance Benefits and Supplemental Security Income payments. Tr. at 24-25. The Appeals Council having denied Harris' request for review, the ALJ's decision was the final decision of the SSA. Harris filed a timely complaint with this court; the parties cross motions for summary judgment were referred to Judge Melinson, who recommended Harris' motion be denied, the SSA's be granted, and the SSA's decision affirmed. Harris filed timely objections.

#### **IV. DISCUSSION**

The court will address Harris' four primary objections in turn: 1) improperly disregarding treating doctor's opinion; 2) failing to consider the whole medical record; 3) improperly discrediting Harris' testimony; and 4) insufficiently stating the facts.

##### **A. Standard of Review of Administrative Law Judge Decisions**

The standard of review in a social security disability case is whether the SSA's decision is supported by substantial evidence. Doak v. Heckler, 790 F.2d 26, 28 (3d Cir. 1986). See also Richardson v. Perales, 402 U.S. 389, 390 (1971). More than a scintilla and less than a preponderance, substantial evidence is what a reasonable mind might accept as adequate to support a conclusion. Id. at 401.

The claimant's initial burden is to demonstrate a medically



determinable disability, expected to last more than twelve months, that precludes resumption of previous employment. 20 C.F.R. §§ 404.1505, 416.905. See Doak, 790 F.2d at 28. Next, the burden shifts to the SSA to show the claimant, considering age, education, and work experience, has the capacity to perform jobs that exist in the national economy. 20 C.F.R. §§ 404.1520, 416.920. See Doak 790 F.2d at 28. Once the SSA meets this burden, the claimant may rebut it with evidence that he cannot perform such work. An ALJ may grant less weight to doctor's and claimant's expressions of disability when supported by the medical evidence of record. Facyson v. Barnhart, 94 Fed. Appx. 110, 113-14 (3d Cir. 2004).

#### **B. Treating Doctor's Opinion**

Harris argues the ALJ improperly disregarded the opinions of his treating doctors, Dr. Turtz and Dr. Kaplan, that Harris was disabled.

A treating doctor's opinion is usually given great weight. See Frankenfield v. Bowen, 861 F.2d 405, 408 (3d Cir. 1988). However, if the doctor's opinion is not consistent with his own findings, or with the entire medical record, an ALJ may disregard that opinion. S.S.R. 96-2p, 111 (Supp. 2003). See Jones v. Sullivan, 954 F.2d 125, 129 (3d Cir. 1991); Adorno v. Shalala, 40 F.3d 43, 47-48 (3d Cir. 1994); Coria v. Heckler, 750 F.2d 245, 247 (3d Cir. 1984).

While medical sources often offer opinions about whether an individual is 'disabled' or 'unable to work,' legal disability is an administrative finding reserved to the SSA. "Such opinions on these issues must not be disregarded. However . . . they can never be entitled to controlling weight or given special significance." S.S.R. 96-5p, 127 (Supp. 2003). See Plummer v. Apfel, 186 F.3d 422, 427-28 (3d. Cir. 1999).

Dr. Kaplan, a treating doctor, opined on several occasions that Harris remained disabled, but did not explain why he reached that conclusion. Tr. at 21. On the contrary, Dr. Kaplan noted "no motor problems" in 1995; thereafter, he merely stated Harris "remains disabled" without explaining any specific physical disability.

As the ALJ observed, Harris' doctors reported 4/5 or better arm strength, 4/5 or better grip strength, and depressed but present reflexes, beginning in 1994 and continuing throughout treatment. Tr. at 21. Judge Melinson noted that Dr. Kaplan stated in January 2001: "Examination continues to show mild restrictions." R&R at 10, Tr. at 113. The ALJ noted that repeated medical imaging revealed no abnormal spinal cord activity. Tr. at 20, 21, 136, 212, 216, 225.

The ALJ cited two separate state agency medical examinations, both of which found Harris had residual functional capacity for medium exertion level work. The medical evaluations

specifically noted his residual functional capacity to: lift and carry 50 pounds occasionally and 25 pounds frequently; sit, stand or walk for six hours in an eight hour workday; and push and pull with his arms. Tr. at 22, 36-39.

The ALJ reviewed the reports of Harris' doctors, medical imaging reports, and the reports of the state agency medical consultants. The ALJ found neither the complete record nor the treating doctors' findings supported their opinions on Harris' disability. Because Harris' treating physicians' opinions were inconsistent with their own findings and the medical record as a whole, adequate consideration was given to their opinions.

#### **C. Consideration of the Whole Medical Record**

Harris avers the ALJ and Judge Melinson improperly failed to consider the whole record, specifically Dr. Kaplan's opinions on disability, and documentation of Harris' difficulty in reaching and grasping objects.

An ALJ must review the whole medical record, but may apply different weights based on credibility determinations. 42 U.S.C. § 423(d). Medical opinions offer an evaluation of the nature and severity of the claimant's impairment, and include descriptions of symptoms, diagnosis and prognosis, and the claimant's capacity despite his restrictions. 20 C.F.R. § 404.1527(a), 416.927(a).

The SSA considers work-related evidence and medical testimony and makes the final assessment of an applicant's

residual functional capacity. 20 C.F.R. §404.1527(e).

Distinguished from SSA findings, medical evidence is material reflecting a doctor's opinion based on his or her own knowledge; a residual functional capacity finding is the adjudicator's ultimate assessment based on all the evidence in the record. Id., S.S.R. 96-5p 125 (Supp. 2003).

An ALJ may consider other factors that tend to support or contradict medical opinions. 20 C.F.R. §404.1527(d). The ALJ must explain why certain evidence is discounted and why other evidence is accepted. Claussen v. Chater, 950 F. Supp. 1287 (D.N.J. 1996). The reviewing court must be able to determine if the ALJ considered and rejected evidence, as opposed to just ignoring it. Plummer, 186 F.3d at 429.

Here, the ALJ reviewed the reports of the original surgeon (Dr. Turtz) and hospital, Harris' treating doctor for the next 9 years (Dr. Kaplan), and the state agency medical consultants. No other independent medical care appears in the record. The ALJ explained that the doctors' findings failed to support disability, and that the capability found by the state examiner was not refuted by medical evidence, diagnosis, or prognosis. The ALJ may not have cited every single doctor visit, but it is evident that the ALJ reviewed all relevant medical findings.

Harris' claim that the ALJ ignored reports of numbness in his hands is also unfounded. The ALJ noted that problem

explicitly: "paresthesias in both hands" Tr. at 20; "His hands are always numb." Tr. at 21. The ALJ observed reports from Drs. Kaplan and Turtz did not support this assertion, and cited state agency reports indicating Harris had limited (but not nonexistent) tactile sensation. Tr. at 22.

The ALJ addressed the evidence Harris claims was omitted. The ALJ mentioned some of this evidence specifically, and the rest by reference to the reports in which it was contained. Reviewing the medical evidence, discounting unsupported conclusions, and reviewing Harris' testimony, the ALJ found his claim of disability was not supported. There is nothing in the trial record to suggest the ALJ ignored relevant evidence.

#### **D. Credibility**

Harris also argues the ALJ improperly discredited his claims of pain and incapacity.

An administrative law judge should credit claimant testimony to the extent it is consistent with medical evidence. The ALJ should review the medical evidence first, and the claimant's testimony second, SSR 97-2p, to see if the complained-of symptoms are consistent with medical evidence. 20 CFR 404.1529(b), Burnett v. Commissioner of Social Sec. Admin., 220 F.3d 112, 122 (3d Cir. 2000).

Pain may be disabling when it prevents a claimant from performing substantial gainful activity, but pain or discomfort

caused by working does not mandate a finding of disability. S.S.R. 96-7p, 134 (Supp. 2003). Doctors' reports of complaints of pain, without more, are not medical evidence. 20 C.F.R. § 404.1527(a)(2).

In his objections, Harris cites Dr. Kaplan's reports of Harris' complaints of difficulty walking and standing, trigger points, lumbar spasms, low back pain, fatigue, leg shaking, requirement of a cane, depressed reflexes, and left arm weakness. Kaplan's reporting these subjective complaints, without diagnosing them or substantiating them medically, does not constitute relevant evidence.

Harris' doctors were unable to substantiate many of his claims. Dr. Turtz observed Harris' slow progress after the first surgery was "out of proportion to the abnormality found at surgery." Tr. at 217.

The ALJ observed Dr. Kaplan had difficulty explaining Harris' symptoms:

The claimant complained of neck pain and low back pain. He demonstrated an atypical uncharacteristic left stiff knee gait. [Dr. Kaplan] was unable to explain on an objective basis any reason for the atypical left leg gait. The doctor reported that objective orthopedic examination of the cervical spine indicated good recovery of movement and function and no pain on motion.

Tr. at 21. After investigating Harris' complaint of leg collapse, Dr. Kaplan commented, "I am not sure what is going on." Tr. at 161.

Finally, there was no record of further surgery after Drs. Turtz and Kaplan diagnosed carpal tunnel syndrome, after Dr. Turtz recommended a fusion at C3-4, or after Dr. Kaplan referred Harris to Dr. Hillabrand following Harris' first report of leg collapse. Finding no treatment beyond acupuncture and medication in the preceding eight years, the ALJ decided Harris' impairment could not be as severe as he claimed.

The ALJ reasonably determined Harris was not as limited as he alleged. The ALJ considered the reports of Drs. Kaplan and Turtz, the absence of objective medical causes for Harris' complaints, and Harris' surgical history. Completing a thorough review of the medical evidence, the ALJ determined that the record did not entirely support Harris' claims, and properly discounted his testimony.

#### **E. Characterization of the Factual Record**

Harris objects to Judge Melinson's statement of the facts with regard to: 1) Dr. Turtz's initial assessment of Harris' condition; 2) Dr. Barolat's 1995 opinion that Harris did not need surgery; and 3) Dr. Kaplan's initial assessment of Harris' condition.

On judicial review of an administrative law judge decision, the reviewing court does not examine the facts de novo, but only determines whether there is substantial evidence to support the

ALJ's decision. Doak, 790 F.2d at 28. The ALJ is the sole fact finder in Social Security cases, not the Magistrate Judge. See Grant v. Shalala, 989 F.2d 1332, 1338 (3d Cir. 1993). This court will review findings of the Magistrate Judge for clear error. Fed. R. Civ. P. 52(a).

Harris specifically objects that Judge Melinson did not mention certain specific findings of Dr. Turtz regarding weakness of Harris' left bicep and depressed reflexes when he examined him in 1994. However, in the paragraph immediately before that cited by Harris in his objection, Judge Melinson noted "[a]fter weeks of continued weakness in his arms and legs, Harris was re-admitted to MCP [for] additional testing." R&R at 4 (Paper No. 14). Judge Melinson and the ALJ adequately considered the weakness Harris described.

Harris also claims Judge Melinson's failure to address Dr. Kaplan's December 6, 1995 report was clear error. In that report, Dr. Kaplan stated Dr. Barolat had opined Harris was probably not a candidate for surgery. Judge Melinson did note Dr. Turtz recommended surgery in 1997, two years after Dr. Barolat's suggestion. This omission does not establish that the ALJ's decision was not supported by substantial evidence.

Harris also complains Judge Melinson did not adequately review the ALJ's consideration of references to restricted neck and shoulder motion, tingling in the hands, stiff back movement,



tight hamstrings, and depressed reflexes. Judge Melinson provided a brief summary and cited Dr. Kaplan's diagnosis of chronic cervical radiculopathy (which has customary symptoms including restricted neck, arm, and shoulder movement, and arm tingling or numbness) and chronic pain. The R&R also referred to Dr. Kaplan's report of bilateral lumbosacral radiculopathy, or herniated disc problems in the lower back.

The ALJ, not Judge Melinson, is required to review and discuss all the evidence. The summary of the facts in the R&R provided the relevant facts Harris claims were omitted. Judge Melinson properly examined the ALJ's review of the medical record and correctly determined the findings of the ALJ were supported by substantial evidence that Harris could perform light work and was not disabled.

## **V. CONCLUSION**

For the foregoing reasons, Harris' objections are without merit. The defendant's motion for summary judgment is granted, Harris' motion is denied, and the decision of the SSA is affirmed.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES HARRIS,	:	CIVIL ACTION
Plaintiff	:	
	:	
	:	
v.	:	
	:	
JOANNE BARNHART, SOCIAL	:	
SECURITY ADMINISTRATION,	:	
Defendant	:	NO. 03-0213

ORDER

AND NOW, this \_\_\_\_ day of July, 2004, upon consideration of Plaintiff's Petition for Review of a Decision of the Secretary of Health and Human Services Denying Plaintiff Social Security Benefits (Paper No. 1) United States Chief Magistrate Judge James R. Melinson Report and Recommendation (Paper No. 14), Plaintiff's Objections to Chief Magistrate Judge's Report and Recommendation (Paper No. 15), for the reasons stated in the foregoing Memorandum, it is hereby **ORDERED**:

1. The Report and Recommendation (Paper No. 14) is **APPROVED AND ADOPTED**;
2. Plaintiff's Objections to Magistrate Judge's Report and Recommendation (Paper No. 15) are **OVERRULED**;
3. Defendant's Motion for Summary Judgment is **GRANTED**;
4. Plaintiff's Motion for Summary Judgment is **DENIED**;
5. The Clerk of the Court shall mark this case closed.

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S.J.